87-1646

No. .....

In The
Supreme Court of the United States
October Term, 1987

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SEQUOIA BOOKS, INC.,
Petitioner,

v.

STATE OF ILLINOIS,
Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

—o—

MICHAEL J. ZOPF
RENO, O'BRYNE & KEPLEY, P.C.
501 West Church
P.O. Box 693
Champaign, IL 61820
(217) 352-7661
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether a search warrant document, resulting in the seizure of a large number of different magazines, is constitutionally sufficient where probable cause for obscenity is tied to the depiction of a single sexual act.

2. Whether a prior adversary hearing is constitutionally required when a search warrant authorizes the confiscation of an unlimited number of magazines, which are purportedly obscene because they contain a depiction of a single sexual act.

3. Whether a search warrant which predetermined obscenity and authorized executing officers to take any magazine that contained a depiction of a single sexual act is a constitutionally invalid general warrant.

4. Whether the procedure of combining a large number of magazines into a single count complaint, and the use of a general verdict form with accompanying special interrogatory, is constitutionally permissible.

5. Whether legislative enactments establishing adult uses are relevant, probative evidence of contemporary community standards in the determination of obscenity.

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No. .....

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—o—

Petitioner, Sequoia Books, Inc., prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Illinois, Second District, entered on August 24, 1987.

—o—

[1] There are no parent companies, subsidiaries, or affiliates of the corporation.

OPINION BELOW

The opinion of the Appellate Court of the State of Illinois, Second District, is reported at 160 Ill.App.3d 315, 513 N.E.2d 468 (1987). A copy of the opinion is included in the Appendix as Exhibit A.

JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C. § 1257(3) for review by certiorari of the decision of the Illinois Appellate Court for the Second District.

A written opinion was issued by the Appellate Court on August 24, 1987, and rehearing was denied by the court on October 5, 1987, a copy of which denial is included in the Appendix as Exhibit B. The petitioner sought leave to appeal to the Illinois Supreme Court, and on February 4, 1988, its petition was denied. A copy of the order denying leave to appeal is included in the Appendix as Exhibit C. Petitioner filed an affidavit of intent to seek review in the United States Supreme Court, and a motion to stay the mandate, with the Illinois Supreme Court. On February 24, 1988, its motion was granted. A copy of the order staying the mandate is included in the Appendix as Exhibit D.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First, Fourth and Fourteenth Amendments to the Constitution of the United States, and the Illinois Obscenity Statute, Ch. 38, ¶ 11-20, Ill.Rev.Stat. (1983), and as revised effective January 1, 1986, are set forth in the Appendix as Exhibits E and F.

———o———

STATEMENT OF THE CASE

The petitioner in this case is Sequoia Books, Inc., the corporate owner and operator of the Denmark Bookstore, an adult bookstore located at 1300 Business 30 West, Aurora, Illinois. The bookstore restricts admittance to adults over the age of 18 years. At the appellate court level, two separate cases involving petitioner were consolidated for purposes of the appeal. The criminal charges that underlie the cases against petitioner involve the offense of sale of alleged obscene magazines, a violation of the Illinois Obscenity Statute, Ch. 38, ¶ 11-20, Ill.Rev.Stat.

In the first case, on August 30, 1985, Glenn Calvert, an investigator for the Kendall County State's Attorney's Office, executed an affidavit summarizing his visit on August 29, 1985 to the Denmark Bookstore in rural Aurora, Illinois. The affidavit recited that Calvert had reviewed several hundred magazines during the approximate 15 minutes he was in the store, and that the material contained depictions of sexual acts. At that time Calvert purchased three magazines from the store, which were

subsequently tendered to Circuit Judge John Peterson for review. A second affidavit from Kendall County Investigator Ricky Holman asserted that "subsequent to August of 1985" numerous other criminal obscenity charges had been filed with regard to the Denmark Bookstore.

In the second case, on February 10, 1986, Illinois State Police Investigator Harold Andrews followed a similar procedure which culminated in the presentation of a complaint for search warrant and affidavit to Judge James M. Wilson, again with regard to the Denmark Bookstore. Andrews' affidavit asserted that he had visited the store on two occasions, on January 1, 1986, and again on February 6, 1986. On each date he purchased four magazines, and the eight magazines were tendered to the judge for review. The affidavit also stated the magazines observed at the store contained similar depictions of sexual acts.

Based on these complaints and affidavits, each judge issued a search warrant directed at the Denmark Bookstore to seize:

> Magazines, containing depictions or portion thereof of the following: Cunnilingus, fellatio, anal intercourse, excretion of semen from penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, insertion of tongue into anus.

The search warrant in the second case included the additional description: "and also depiction of male or female persons with genitals or breasts being fettered, bound or otherwise physically restrained, insertions of objects into penis or anus." Copies of the complaint, affidavit and search warrant from each case is included in the Appendix as Exhibit G.

Based on these search warrants, a seizure was conducted in each instance. In the August, 1985 search, 48 magazines were taken, after police officers reviewed the cover and a few pages inside various magazines and determined, in their opinion, that the acts depicted fit the description of activities set forth in the search warrant. The seizure was terminated when the number reached 48 because Calvert had been instructed by the Kendall County State's Attorney to seize approximately 50 magazines. In the February of 1986 seizure, 177 magazines were taken, following a similar review and determination procedure by officers as in the first case. The time required for the review of each magazine was approximately 15 seconds.

In neither instance was the judge advised of the number of magazines to be seized, nor were copies seized of the same magazines previously reviewed by the judges. During the determination of what magazines were to be seized, no references were made by investigating officers to the Illinois Obscenity Statute or the tripartite test for obscenity. In each case, the description of material to be seized contained on the search warrant was prepared by the Kendall County State's Attorney's Office.

A criminal complaint was filed in each case which, in one count alleged that Sequoia Books, Inc., d/b/a Denmark II, committed the offense of obscenity by offering obscene magazines for sale. A list of the magazines seized was incorporated by reference in each complaint. Pleas of not guilty were entered in each case.

In pre-trial motions to dismiss the petitioner contended that the complaints were improperly drawn by the inclusion of a large number of magazines within a single count. Those motions were denied by the court.

Pre-trial motions to suppress were also filed, in which the petitioner asserted that the search and seizure procedure was constitutionally defective. The petitioner contended the warrant was a general warrant which lacked specificity and which was overbroad by authorizing seizure of magazines depicting specified sexual conduct without setting forth the tripartite test for determining obscenity. The petitioner also asserted there was no searching focus on the alleged obscenity of the magazines which were presented to the issuing judge, and that the overall procedure was designed to suppress all sexually explicit material and close the bookstore, thereby constituting an invalid prior restraint. The motion to suppress was denied in each instance.

During its case at each of the trials, the petitioner tendered exhibits of eight adult use ordinances from various local governmental bodies throughout Illinois. A copy of one of the tendered exhibits, the adult use ordinance from the City of Chicago, is included in the Appendix as Exhibit H. These exhibits were presented as evidence of contemporary community standards pursuant to Ill.Rev. Stat., Ch. 38, ¶ 11-20(c)(4). The trial court sustained the State's objection to these exhibits on the basis of relevancy.

Over the petitioner's objection, the court gave an instruction which permitted the jury to find the petitioner guilty of obscenity if they found a single magazine to be obscene. The court reasoned that the procedure of proceeding in a single count for a large number of magazines was acceptable, regardless of whether the jury might find some magazines were not obscene. Also over petitioner's

objection, in addition to a general verdict form, the court gave a special interrogatory to the jury, which required them to answer "yes" or "no" as to the obscenity of each of the magazines on trial.

In the first case, after deliberation the jury returned a finding of guilty against the petitioner, but only partially completed the special interrogatory, answering "yes" to the first eight magazines, but leaving the remaining 40 questions blank. The court accepted the general verdict over petitioner's objections, and required the jury to resume deliberations to complete the remaining 40 questions. The jury returned within minutes, finding the 40 magazines were not obscene. In the second case, the jury returned the general finding of guilty, and completed the special interrogatory finding 170 magazines obscene and 7 not obscene.

The petitioner's motions for directed verdict at the close of all the evidence and timely post-trial motions preserved the constitutional issues raised herein.

The petitioner appealed each case to the Second District Appellate Court for the State of Illinois, and on a consolidated basis, that court affirmed the judgment of the trial court on August 24, 1987, and subsequently, on October 5, 1987, denied the defendant's petition for rehearing.

The appellate court held that the search warrant procedure was proper and concluded its prior opinions in *People v. Sequoia Books, Inc.*, 145 Ill.App.3d 1054, 495 N.E.2d 1292 (1986) and *People v. Patroff*, 141 Ill.App.3d 483, 490 N.E.2d 148 (1986) were dispositive of the issues

raised. In those prior cases, the court had relied on *New York v. P.J. Video,* 475 U.S. 868 (1986), and held *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979), was factually distinguishable. The court had also concluded that the warrant was not general, and allowed for seizure of material containing specific sexual conduct likely to meet the three-prong obscenity test.

With regard to the petitioner's assertions on the refusal of the tendered exhibits of adult use ordinances, the court relied on its prior opinion in *People v. Sequoia Books, Inc.,* 146 Ill.App.3d 1, 496 N.E.2d 740 (1986), where it held that the ordinances addressed zoning problems and thus, did not reflect any judgment on the public acceptance of materials such as those on trial. The court also rejected the petitioner's reliance on *Smith v. United States,* 431 U.S. 291 (1977).

The petitioner's challenge to the combining of multiple charges into a single count and the use of a special interrogatory with the general verdict was also rejected by the court. The court held the acceptability of filing separate offenses in one count is well-established if the offenses are part of a single transaction. Although acknowledging that the use of special interrogatories are not favored in criminal cases, the court relied on *Heald v. Mullaney,* 505 F.2d 1241 (1st Cir. 1974), holding that the interrogatory did not "catechize, color or coerce the jury's decision making" and in fact, that it benefitted the defendant because it lessened the collective impact of the material.

The petition for rehearing filed with the appellate court was denied on October 5, 1987, and on February 4,

1988, the petitioner's timely petition for leave to appeal to the Illinois Supreme Court was denied.

REASONS FOR GRANTING THE WRIT

I.

THE SEARCH WARRANT PROCEDURE UTILIZED IN THIS CASE WAS CONSTITUTIONALLY INVALID BECAUSE IT CONSTITUTED A GENERAL WARRANT, THERE WAS NO SEARCHING FOCUS ON THE ISSUE OF THE OBSCENITY OF THE MAGAZINES TO BE SEIZED, AND THE SEIZURE AMOUNTED TO A PRIOR RESTRAINT.

This case presents egregious factual circumstances where police officers conducted a massive search and seizure that imposed a system of prior restraint on the petitioner's bookstore. For over 25 years, this Court has condemned large scale search and seizure procedures, where First Amendment interests of liberty of expression are involved. *Marcus v. Search Warrants of Property,* 367 U.S. 717 (1961); *A Quantity of Copies of Books v. State of Kansas,* 378 U.S. 205 (1964); *Stanford v. Texas,* 379 U.S. 476 (1965); *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636 (1968); *Heller v. New York,* 413 U.S. 483 (1973); *Roaden v. Kentucky,* 413 U.S. 496 (1973). Recently, this Court reaffirmed these fundamental constitutional principles. *Lo-Ji Sales Inc. v. New York,* 442 U.S. 319 (1979); *Maryland v. Macon,* 472 U.S. 463 (1985).

Most recently, in *New York v. P.J. Video*, 475 U.S. 868 (1986), the Court reiterated the long-standing concern and requirement of special conditions on seizures involving First Amendment implications. In *P.J. Video*, the Court was addressing the standard of probable cause for issuance of a warrant involving seizure of materials presumptively protected by the First Amendment. In reversing the New York Court of Appeals decision, this Court held that prior decisions did not dictate a higher standard in making a probable cause determination. Rather, as set forth in *Heller v. New York*, the requirement was that probable cause must be determined to safeguard First Amendment interests, and that the protection enunciated in cases such as *Roaden*, *A Quantity of Books*, *Heller*, *Marcus*, and *Lee Art Theatre*, were adequate to ensure there is no impairment of the First Amendment interests. The Court in *P.J. Video* held, in accordance with the requirements of these prior cases, that the affidavits attached to the search warrant provided a factual basis to focus solely on the issue of obscenity, utilizing a standard of probable cause.

Unlike *P.J. Video*, in the present case none of the fundamental constitutional requirements set forth in *Marcus* and its progeny have been met. The search warrant documents failed to establish probable cause that the materials to be seized were obscene. The issuing judge was not examining the materials to be seized and instead, issued a general warrant which left total discretion to the executing officers as to what items and what quantity was to be seized. In short, there was no searching focus on the concept of obscenity, and the presence of depictions of sexual conduct alone cannot satisfy all three elements

of the test for obscenity. Moreover, the judge was acting on an absence of information as to magazines that were ultimately seized.

Perhaps the most glaring constitutional deprivation to petitioner in the procedure under scrutiny is the clear imposition of a system of prior restraint. Under the general warrant issued, with the discretion given to the police officers executing the warrant, the issuing judge could not have predicted in any manner the extent of the seizure that would ultimately be accomplished. It is obvious the focus of the procedure was to economically damage the bookstore operation. The holdings of *Marcus*, *Quantity*, and *Lo-Ji Sales*, require that an adversary hearing precede the issuance of the warrant and the seizure that results. There is sound historical, constitutional, and judicial disapproval of such procedures directed at instilling the type of economic disruption intended by the State in the instant case.

The holding of the appellate court in this case ignores the historical condemnation of general warrants and search and seizure procedures with First Amendment implications. The appellate court's holding cannot be squared with fundamental constitutional principles enunciated by this Court in a long line of cases. The analysis submitted by petitioner has been accepted by two circuits, *United States v. Guarino*, 729 F.2d 864 (1st Cir. 1984) and *United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977), which creates a conflict with the decision of the Illinois Appellate Court for the Second District. This Court should acknowledge the significance of the constitutional issues presented by this case and should grant certiorari.

II.

THE COMBINATION OF A LARGE NUMBER OF MAGAZINES INTO A SINGLE COUNT COMPLAINT, AND THE USE OF A GENERAL VERDICT FORM WITH ACCOMPANYING SPECIAL INTERROGATORY, PERMITTED THE CONVICTION OF THE DEFENDANT FOR THE DISSEMINATION OF PROTECTED SPEECH AND CREATED A SYSTEM OF PRIOR RESTRAINT.

This Court is presented for the first time with an opportunity to review and condemn a constitutionally defective method of prosecution in a case with First Amendment implications. In one instance, 48 separate charges were included under one count, and in the second, 177 charges were combined into a single count.

In *Street v. New York,* 394 U.S. 576 (1969), this Court made clear the proper charging procedure where protected and unprotected conduct is at issue. In *Street,* the defendant was charged in a single count information with desecrating a flag by burning it and by oral statements. In reversing the defendant's conviction on constitutional grounds, the Court stated:

> [W]hen a single count indictment or information charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together . . . (omitting citations) There is no comparable hazard when the indictment or information is in several counts and the conviction is explicitly declared to rest on findings of guilty on certain of those counts, for in such in-

> stances there is positive evidence that the trier of fact considered each count on its own merits and separately from the others.
>
> 394 U.S. at 588 (footnote omitted)

See also, *Eaton v. City of Tulsa*, 415 U.S. 697 (1974).

The trial court rejected defendant's position that, under the guiding principles of *Street v. New York*, where multiple magazines are charged, the correct form of the charging instrument is to require a single count as to each item of material, with issues instructions and a verdict form on each. See petitioner's tendered instructions, No. 1 and 2 in 85-CM-280, and 1, 2 and 3 in 86-CM-27. The single-count method of prosecution constituted an impermissible prior restraint on material enjoying First Amendment freedom, because separate and specific consideration was not given to each magazine.

The State, however, was allowed to proceed with the single count method, and the petitioner contended that because protected and unprotected conduct was at issue, the jurors were required to find all of the magazines to be obscene to return a guilty verdict. The State's solution to the problem, approved by the court over the petitioner's objections, was the use of a special interrogatory along with the general verdict form. This interrogatory required the jury to indicate a "yes" or "no" as to the obscenity of each magazine.

Special interrogatories in criminal cases only create confusion and are routinely disapproved in criminal cases. *United States v. Jackson*, 542 F.2d 403 (7th Cir. 1976); *United States v. Spock*, 416 F.2d 626 (1st Cir. 1969). As noted by the First Circuit Court of Appeals in *Spock*, par-

ticularly where First Amendment interests are involved, the State should not be allowed to use procedural advantage to expand the strict elements of the offense. Moreover, there is a potential infringement on a jury's freedom when they are asked special questions. 416 F.2d at 172, 181.

Heald v. Mullaney, 505 F.2d 1241 (1st Cir. 1974), relied upon by the appellate court, provides no basis for supporting the use of a special interrogatory in the instant case. Even *Heald* recognized the suspect use of special questions in a criminal proceeding, and the court there was reviewing the propriety of the procedure on a limited use where the jury's answer did not lead toward a verdict of guilt. 505 F.2d at 1245-1246.

The only method to guarantee specific consideration for each of the magazines was to require individual counts. The present situation, where a jury utilized a general verdict form as to guilt or innocence, and then proceeded to make a line by line determination as to the obscenity or non-obscenity of the listed magazines, does not guarantee that only unprotected conduct is punished. The real probability exists that no 12 jurors actually unanimously agreed upon the obscenity of any one magazine. This potential is patently evident from the confusion which resulted in the first case, where the jury failed to follow the court's basic instructions on the special interrogatory.

The petitioner's constitutional rights under the First and Fourteenth Amendments have clearly been violated by the charging method in this proceeding. Such a procedure is contrary to the principles pronounced by this Court condemning punishment for protected conduct and the imposition of a prior restraint on protected activity. This

Court should grant certiorari because of these significant constitutional issues.

III.

ADULT USE ORDINANCES CONSTITUTE RELEVANT, PROBATIVE EVIDENCE ON THE ISSUE OF CONTEMPORARY COMMUNITY STANDARDS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In *Smith v. California*, 361 U.S. 147 (1959), this Court recognized the need for evidence of contemporary community standards in an obscenity case, and the opportunity for a defendant to present such evidence. The instant case addresses an important question of whether adult use ordinances from various local governmental bodies within the State of Illinois constitute relevant and probative evidence on the application of contemporary community standards.

In an obscenity case, the trier of fact must resolve whether the material on trial has acquired a level of acceptance by the general public. This determination is a relevant inquiry as to whether the material appeals to a prurient interest and is patently offensive. Therefore, the acceptance of such material in various other communities is evidence of contemporary community standards. Relevant evidence tending to shed light on community standdards is therefore admissible. See *e.g. People v. Nelson*, 88 Ill.App.3d 196, 410 N.E.2d 476 (1980); *Saliba v. State of Indiana*, 475 N.E.2d 1181 (Ind.App. 1985).

The petitioner in the instant case tendered certified copies of adult use ordinances from eight communities

across the State of Illinois. These ordinances represented a public awareness and acceptance of materials such as those on trial and, indeed, defined the same class of materials. These ordinances permitted businesses to operate and sell materials such as those on trial, and the very enactment and existence of the ordinances establish a standard of acceptability of such materials.

Whether a county-wide or statewide standard is applied, evidence of this nature would give guidance to the trier of fact. The Illinois legislature even anticipated this by providing that:

> In any prosecution for an offense under this section, evidence shall be admissible to show:
>
> * * *
>
> (4) The degree, if any, of public acceptance of the material in this state.
>
> Ill.Rev.Stat. (1983), Ch. 38, ¶ 11-20 (c) (4)

The jury's factfinding function was undermined by the denial of the proffered relevant and material evidence.

In a case such as this, acceptability is of particular concern, for as Justice Harlan stated in *Smith v. California,* 361 U.S. 147 (Harlan, J., concurring in part and dissenting in part, 1959):

> The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process . . . requires a State to allow a litigant in some manner to introduce proof on this score. While a State is not debarred from regarding the trier of fact as the embodiment of community standards, competent to judge a challenged work against those standards, it is not privileged to rebuff *all* efforts to enlighten or persuade the trier.

361 U.S. at 171-172.

In many instances, particularly where a statewide standard is applied, as is the case in Illinois, jurors have little experience on which to base an opinion of what the contemporary community standard is. While evidence of availability does not inexorably translate to acceptability, the evidence would aid the trier of fact in its function.

This Court has recognized that evidence tending to show public policy serves this function of educating a trier of fact who must apply the concept of community standards within the definition of obscenity. In *Smith v. United States*, 431 U.S. 291 (1977), the defendant in a federal obscenity prosecution unsuccessfully contended that the Iowa Obscenity Statute set forth the applicable community standards. The Court of Appeals for the Eighth Circuit affirmed the conviction and concluded that the issue of contemporary community standards was a federal question and was not to be determined on the basis of state obscenity law. The circuit court noted, however, the admission of the Iowa Obscenity Statute into evidence, and that:

> [T]his was designed to give the jury knowledge of the State's policy on obscenity when it determined the contemporary community standard.
>
> 431 U.S. at 299.

This Court granted certiorari to review the relationship between state legislation regulating or refusing to regulate the distribution of obscene material, and the issue of contemporary community standards in a federal prosecution.

In discussing that legislative relationship to the concept of contemporary community standards, the Court in *Smith* noted that community standards provide the mea-

sure against which the jury decides the question of appeal to prurient interest and patent offensiveness. The Court commented that such legislative enactments define the conduct regulated, and can vary in degree and approach. The Court concluded that states could adopt different approaches and "might add a geographic dimension to its regulation of obscenity through the device of zoning laws." 431 U.S. at 303. With respect to the introduction of the Iowa statute into evidence, the Court observed that:

> Even though the State's law is not conclusive with regard to the attitudes of the local community on obscenity, nothing we have said is designed to imply that the Iowa statute should not have been introduced into evidence at petitioner's trial. On the contrary, the local statute on obscenity provides relevant evidence of the mores of the community whose legislative body enacted the law. It is quite appropriate, therefore, for the jury to be told of the law and to give such weight to the expression of the State's policy on distribution as the jury feels it deserves.
>
> 431 U.S. at 307-308.

Other jurisdictions have recognized that evidence of this type is an aid to the jury, and that it was error for a trial court to deny or reasonably limit a defendant's right to introduce competent exhibits which directly relate to any or all of the elements of the definition of obscenity. *United States v. Various Articles of Merchandise*, 750 F.2d 596, 599 (7th Cir. 1984); *State ex rel Leis v. William S. Barton Company, Inc.*, 45 Ohio App.2d 249, 344 N.E.2d 342 (1975). Petitioner submits that the decision of the Illinois Appellate Court affirming the exclusion of the relevant, probative evidence on community standards, is in conflict with these decisions, meriting certiorari review.

The petitioner has a constitutional right to due process of law, which includes the presentation of evidence relevant to each of the elements of the offense charged. This is especially true in cases with First Amendment implications. *Roaden v. Kentucky* 413 U.S. 496, 504 (1973). The petitioner submits that local municipality adult use of ordinances, such as those tendered as exhibits at the trial court, are the same type of relevant evidence approved by this Court in *Smith v. United States.* Clearly, those legislative enactments, even if classified as a regulation of obscenity through zoning, are evidence of the "mores of the community whose legislative body enacted the law." The exclusion of this evidence violated the petitioner's rights under the First and Fourteenth Amendments to the Constitution of the United States. This Court should grant certiorari to resolve this issue.

—o—

CONCLUSION

This Court should grant a writ of certiorari to review the judgment and opinion of the Appellate Court of the State of Illinois, Second District, because of the significant issues presented under the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

MICHAEL J. ZOPF
RENO, O'BRYNE & KEPLEY, P.C.
501 West Church Street
P.O. Box 693
Champaign, IL 61820
(217) 352-7661
Attorney for Petitioner

April, 1988.

EXHIBIT A

Nos. 2-86-0563 and 2-86-0577 Cons.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the) Sixteenth Judicial) Circuit, Kendall
Plaintiff-Appellee,	) County, Illinois.)
v.	) Nos. 85 CM 280 &) 86 CM 27
SEQUOIA BOOKS, INC.,	)
Defendant-Appellant.	) Honorable Wilson) Burnell, Judge) Presiding.

(Filed August 24, 1987)

JUSTICE WOODWARD delivered the opinion of the court:

Following separate jury trials, defendant, Sequoia Books, Inc., was found guilty of obscenity in two cases. Defendant was fined $1,000 plus costs and $924 plus costs, respectively. Defendant appeals from both convictions.

On August 9, 1985, Judge John L. Peterson issued a search warrant for the Denmark Bookstore in Aurora, Illinois, which was owned and operated by the defendant, to search for evidence of the offense of obscenity (Ill.Rev. Stat. 1985, ch. 38, par. 11-20) and to seize any "magazines containing depictions or portion thereof of the following: cunnilingus, fellatio, anal intercourse, excretion of semen

from penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, insertion of tongue into anus." Attached to the complaint for search warrant were the affidavits of Glenn Calvert and Ricky M. Holman, investigators for the Kendall County State's Attorney's office. Calvert's affidavit set forth that he had visited defendant's bookstore and purchased three magazines entitled Cum Shootout, Chain Gang Bang, and Tightropes. Each magazine depicted more than one sexual act described in the search warrant. Calvert spent 15 minutes in the bookstore and observed several hundred magazines many, if not all of which, depicted acts described in the warrant. All of these magazines were offered for sale to the public. Holman's affidavit stated that numerous criminal charges had been filed in Kendall County under section 11-20 of the Criminal Code of 1961 (Act) (Ill. Rev. Stat. 1985, ch. 38, par. 11-20) against various persons resulting from the purchase of magazines and movies from the defendant's bookstore.

Armed with the search warrant, Calvert, Holman, and others, went to the Denmark Bookstore and seized 48 different magazines.

On February 10, 1986, Illinois State Police investigator, Harold Andrews, presented an application for search warrant to Judge James M. Wilson for the Denmark Bookstore, again for seizure of magazines containing depictions of sexual activities and bondage. According to Andrew's affidavit, he had been in the Denmark Bookstore on January 2, and February 6, 1986, and had purchased a total of eight magazines which were tendered to Judge Wilson for review. Judge Wilson issued a search warrant for Den-

mark Bookstore for the seizure of magazines containing depictions of sexual activity, identical to what was described in the search warrant of August 30, 1985, but which also included "depictions of male or female persons with genitals or breasts being fettered or bound or otherwise physically restrained, insertion of objects into penis or anus."

Again, armed with the search warrant, Andrews and Kendall County investigators went to the Denmark Bookstore and seized 177 magazines.

The defendant was then charged in two separate cases with one count of obscenity. Each complaint charged that the defendant had offered obscene magazines for sale, each complaint incorporating by reference the list of magazines seized pursuant to the applicable search warrant. After pleading not guilty, in each case, defendant filed motions to quash the search warrant, suppress evidence, and the return of the items seized, arguing that the search and seizure procedures violated the defendant's constitutional rights under the first, fourth, and fourteenth amendments to the United States Constitution. Following an evidentiary hearing, the motions in both cases were denied.

The defendant also filed motions to dismiss in each case, contending that the complaints were improperly drawn in that a large number of magazines had been included within a single count. Further, the motions to dismiss in each case challenged the constitutionality of the obscenity statute in both its pre-1986 form and its post-1986 form. Following hearings in both cases, the motions to dismiss were denied.

Each case then proceeded to trial. In both cases, the parties stipulated that the defendant owned and operated

the Denmark Bookstore and offered the charged magazines for sale on the dates in question, knowing the nature and contents of the magazines. In each case, the State presented testimony that the magazines lacked value, had a negative and rehumanizing effect on the average adult, and that each of the magazines appealed to the prurient interest of the average adult. In addition, at the trial of the second case, the State also presented testimony that the magazines had no serious value in the fields of literature or art.

In each case, the defendant presented evidence of contemporary community standards through the use of a public opinion poll conducted in 1983, the results of which were designed to establish the attitudes of adults living across the State of Illinois to sexually explicit materials. There was also testimony concerning the various adult bookstores in communities throughout Illinois and the type of magazines that were available for sale there. The defendant also presented testimony that the magazines in both cases did not appeal to prurient interest and, instead, appealed to the normal curiosity of the average adult about sex. Finally, defendant's witnesses testified that the magazines would not lead the average adult to commit antisocial acts, and that the magazines had value in that they provided a release and entertainment for a segment of the population. In both cases, defendant offered into evidence certified copies of the adult use ordinances from several municipalities throughout Illinois as evidence of community standards. The trial court sustained the State's objections to the admission of the ordinances on the basis of relevancy.

At the conferences on jury instructions in the respective cases, the State offered an instruction which permitted the jury to find the defendant guilty of obscenity if they found a single magazine to be obscene. The defendant tendered instructions which would require the jury to find all of the magazines obscene in order to find defendant guilty of obscenity. In both cases, the trial court, accepting the State's theory, ruled that the State could proceed in a single count for as large a number of magazines as it chose and obtain a conviction regardless of a finding by the jury that some magazines were not obscene and thus constitutionally protected. In each case, over defendant's objections, a special interrogatory was given to the jury which required the jury to answer "yes" or "no" as to the obscenity of each magazine on trial. Additionally, a general verdict was given to the jury.

Further, in each case, the trial court, over the defendant's objection, gave the State's instruction which allowed the jury to rely on their "collective observations" in applying Illinois contemporary standards. Also, in each case, the defendant tendered, but the trial court refused to give, instructions which would have informed the jury that the issue of obscenity should be decided in the context of dissemination of the magazine.

In each case, the trial court denied defendant's motion for a directed verdict at the close of the State's case in chief and at the close of all the evidence.

The jury returned a general verdict finding the defendant guilty of obscenity in each case. In the first case, the special interrogatory was completed, finding 8 magazines obscene and 40 not obscene. In returning its verdict,

however, the jury initially answered the "yes" question as to the 8 magazines and left 40 blanks on the special interrogatory. The trial court accepted the general verdict and instructed the jury to continue deliberating. A short time thereafter, the jury returned with its findings that 40 magazines were not obscene. In the second case, the special interrogatory was completed, finding 170 magazines obscene and 7 not obscene.

Defendant's post-trial motion in each case was denied, and defendant was sentenced to pay fines and costs. This appeal followed.

Defendant contends, first, that the search warrant procedure utilized in both cases did not meet the strict requirements necessary when first amendment freedoms are implicated in that: the search warrant applications and supporting documents failed to meet the standard of probable cause; the search warrant was overly broad and allowed the seizure of protected, as well as unprotected material; and the warrant process itself was designed to do economic harm to the operation of defendant's bookstore.

The defendant concedes that this court's opinions in *People v. Sequoia Books, Inc.* (1986), 145 Ill. App. 3d 1054, and *People v. Patroff* (1986), 141 Ill. App. 3d 483, *cert. denied* (1986), — U.S. —, 93 L. Ed. 2d 177, 107 S. Ct. 251, are dispositive of the issues raised regarding the search warrant in these cases. Although the defendant urges us to reconsider our decisions in those two cases, we decline to do so.

Next, the defendant contends that section 11-20 of the Act (Ill. Rev. Stat. 1985, ch. 38, par. 11-20) both in its form

prior to January 1, 1986, and its form after that date, is unconstitutional.

We observe first that our supreme court has consistently upheld the constitutionality of the Act in its pre-1986 form. (See *People v. Ward* (1976), 63 Ill. 2d 437; see also *People v. Sequoia Books, Inc.* (1986), 145 Ill. App. 3d 1054; *People v. Patroff* (1986), 141 Ill. App. 3d 483, *cert. denied* (1986), — U.S. —, 93 L. Ed. 2d 177, 107 S. Ct. 251.) Recently, the United States Supreme Court rendered its decision in *Pope v. Illinois* (1987), 481 U.S. —, 95 L. Ed. 2d 439, 107 S. Ct. 1918. In that case, the court determined that in the prosecution for the sale of allegedly obscene materials, the jury should not have been instructed to apply community standards in determining whether material taken as a whole, lacks serious literary, artistic, political, or scientific value, but rather the trier of fact is required to assess whether a reasonable person would find such value in the material, taken as a whole. The court remanded the case to this court for a determination as to whether the error was a harmless one, stating as follows:

> "The question remains whether the convictions should be reversed outright or are subject to salvage if the erroneous instruction is found to be harmless error. Petitioners contend that the statute is invalid on its face and that the convictions must necessarily be reversed because, as we understand it, the State should not be allowed to preserve any conviction under a law that poses a threat to First Amendment values. But the statute under which petitioners were convicted is no longer on the books; it has been repealed and replaced by a statute that does not call for the application of community standards to the value question. Facial invalidation of the repealed statute would not serve the purpose of preventing future prosecu-

> tions under a constitutionally defective standard. [Citation.]" 481 U.S. —, —, 95 L. Ed. 2d 439, 445-46, 107 S. Ct. 1918, 1921.)

On that basis, therefore, we decline to find the pre-1986 Act unconstitutional.

Effective January 1, 1986, the Act was changed to provide as follows:

> "Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistics, political or scientific value." Ill. Rev. Stat. 1987, ch. 38, par. 11-20(b).

Defendant contends that the new Act is unconstitutional because it fails to define the term "prurient interest." Defendant relies on *Brockett v. Spokane Arcade Inc.* (1985), 472 U.S. 491, 86 L. Ed. 2d 394, 105 S. Ct. 2794. In that case, the United States Supreme Court held unconstitutional a statutory definition of "prurient interest" which would have included materials that appealed to "lust." The court reasoned that a danger existed that such a definition would include materials which appeal to the average adult's normal curiosity about sex and, as such, would not be obscene. Defendant argues that same danger exists under the present Act.

Brockett is distinguishable from the case before us in that our Act provides no definition of the term "prurient

interest." As the State points out, in *Brockett,* the court held that the failure to define the term "prurient," was not a satisfactory ground for striking down the statute.

Comparing the present Act with the definition of obscenity as set forth in *Miller v. California* (1973), 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607, we find that the present statute meets the guidelines set forth in Miller, and we conclude that the present Act is constitutional.

Next, the defendant contends that the trial court erred in refusing to admit the adult use ordinances into evidence. This same argument was raised and disposed of against the defendant in *People v. Sequoia Books, Inc.* (1986), 146 Ill. App. 3d 1. Further, we agree with the State that the defendant's reliance on *Smith v. United States* (1977), 431 U.S. 291, 52 L. Ed. 2d 324, 97 S. Ct. 1756, is misplaced since that case dealt with the introduction of a State statute defining obscenity in a prosecution for using the mails to distribute obscene material. In the present case, the ordinances which defendant sought to introduce do not define obscenity but geographically regulate numerous forms of sexually related activities regardless of whether they are considered obscene. We conclude that the trial court did not err in refusing to admit the ordinances into evidence.

Next, defendant contends the trial court erred in giving the following instruction tendered by the State:

> "In determining whether a magazine is obscene, applying contemporary community standards, you may consider the material in light of your collective observations of life in the State of Illinois, but you must not judge it by your own personal standards even if you are personally offended by the material."

In *People v. Sequoia Books, Inc.* (1986) 145 Ill. App. 3d 1054, we determined that while the language "you may consider the material in light of your collective observations in life, was repetitive and unnecessary, the same instruction, read together with all of the other instructions including the instruction defining obscenity, properly informed the jury that the magazines must not be judged by each juror's own personal standards but by a community standard of the whole State, and, therefore, the submission of the instruction was not harmful under the circumstances.

However, as was noted above, in *Pope v. Illinois*, the United States Supreme Court determined that the giving of such an instruction was error. The court did not determine whether the error required the reversal of the convictions in that case but remanded to this court for that determination. 481 U.S. —, —, 95 L. Ed. 2d 439, 447, 107 S. Ct. 1918, 1922-23.

After reviewing the record in this case, we are of the opinion that no rational juror, properly instructed and viewing the evidence in these cases, could find value in these magazines. We are aware that in *People v. McGeorge* (Docket No. 4-86-0332, 4th Dist., filed June 22, 1987), — Ill. App. 3d —, the Appellate Court for the Fourth District determined that the giving of a similar instruction was error requiring reversal of an obscenity conviction and a new trial. *McGeorge*, however, is distinguishable from the case at bar, for in that case the State offered no testimony as to value, whereas in the case before us the State presented testimony that the magazines in question had no value. Therefore, although the giving of the instruction was error, we conclude it to be harmless.

Next, defendant contends that the trial court erred in refusing to give the following instruction tendered by the defendant:

> "The issue of obscenity should be decided in context. You should consider not only the magazines themselves but also the circumstances under which they are to be disseminated. The circumstances include the nature and location of the business offering the magazines, notice to respective patrons, and precautions, if any, to insure that patrons will not be unwillingly exposed to such magazines."

The above instruction was a non-IPI instruction. A non-IPI instruction should be used only if a pattern instruction does not contain an accurate instruction on the subject that the jury should be instructed upon and if the tendered non-IPI instruction is simple, impartial, and free from argument. (*People v. Sequoia Books, Inc.* (1986), 140 Ill. App. 3d 1054, 1064; 87 Ill. 2d R. 451(a).) The decision whether to give a non-IPI instruction is within the discretion of the trial court. *People v. Moore* 1980), 89 Ill. App. 3d 202, 209.

In *People v. Pope* (1985), 138 Ill. App. 3d 726, *rev'd and remanded on other grounds* (1987), 481 U.S. —, 95 L. Ed. 2d 439, 107 S. Ct. 1918, this court upheld the trial court's refusal to give an instruction which asked the jury to give particular consideration to survey evidence introduced by the defendant in that case. We held that the instruction was properly refused on the basis that it unduly underscored the importance of one piece of evidence. That same reasoning is applicable here, and, therefore, we conclude that the refusal to give the above quoted instruction was not error.

Finally, the defendant contends that the combining in each case of multiple charges of obscenity with general verdicts of guilty or not guilty followed by a special interrogatory in reference to the obscenity of each magazine was improper. The defendant argues that it could very well have been found guilty in each case because of the collective impact of all the material.

Defendant relies on *Street v. New York* (1969), 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354. In that case, the defendant was charged in a single count information with desecrating a flag by burning it and by oral statements. The United States Supreme Court reversed his conviction on the basis that there was an unacceptable danger that the trier of fact will have regarded the two acts as intertwined and might have rested the conviction on both together even though one was constitutionally protected and the other was not. Nonetheless, it is well established that separate offenses can be charged in different counts or in one count of an indictment if the offenses are part of a single transaction. *People v. McMullen* (1948), 400 Ill. 253; *People v. Johnson* (1967), 79 Ill. App. 2d 226.

Defendant correctly states that the use of special interrogatory is not favored in criminal cases. (See *United States v. Jackson* (7th Cir. 1976), 542 F.2d 403; *United States v. Spock* (1st Cir. 1969), 416 F.2d 165.) In *Spock*, after noting, *inter alia*, that the Federal Rules of Criminal Procedure contain no provision for special interrogatories, the United States Court of Appeals for the First Circuit stated as follows:

> "We are not necessarily opposed to new procedures just because they are new, but because they should be adopted with great hesitation. [Citation.]

It takes but little imagination to see that the present case should be the last, rather than first, to embark upon a practice of submitting special jury findings in a criminal case along with the general issue for no significant reason. Here, whereas, as we have pointed out, some defendants could be found to have exceeded the bounds of free speech, the issue was peculiarly one to which a community standard or conscience was, in the jury's discretion, to be applied. [Citation.] Whether we agree with defendants' position or not, this was not a case to be subjected to special limitations not sanctioned by general practice. We must hold the court's action to be prejudicial error." 416 F.2d 165, 183.

However, in *Heald v. Mullaney* (1st Cir. 1974, 505 F.2d 1241, the same court adopted a modified view towards special interrogatories, stating as follow:

"[W]e do not believe that a mechanical *per se* rule of unconstitutionality is warranted for all special questions in criminal cases. In *Spock* we were exercising our supervisory powers and, therefore, did not have to reach constitutional ground. [Citation.] To be sure, *Spock* condemned special questions in terms of their effect upon the independence of juries, a ground going to the institutional integrity of juries and having plain constitutional implications. * * * We have little doubt that, in general, the use of special questions and verdicts in any criminal proceedings, state or federal, is suspect not only as a matter of sound judicial policy but of due process as well.

We know, however, that special questions have been permitted for some very limited purposes even in federal criminal proceedings. We cannot say that every specialized use that may emerge under state procedures and statutes necessarily violates the due process clause. Some usages may be exempt from the dangers described in Spock; for example, certain questions may plainly lack any capacity to catechize,

color or coerce the jury's decision making." 505 F.2d 1241, 1245-46.

We agree with the State that, rather than harmful to the defendant, the use of the special interrogatories, which required the juries to make a separate determination as to each magazine, actually benefited the defendant, as it lessened the collective impact of the material. Compare *Heald v. Mullaney* (1st Cir. 1984), 505 F.2d 1241. Even were we to conclude that the use of special interrogatories in these cases was error, the error would be harmless since the finding by the jury in each case that one magazine was obscene was sufficient to sustain the verdict of guilt.

For all of the foregoing reasons, the judgment of the circuit court of Kendall County is affirmed.

Affirmed.

REINHARD and UNVERZAGT, JJ., concur.

EXHIBIT B

State of Illinois
Appellate Court Second District
Elgin

60120

OFFICE OF THE CLERK
312-695-3750

Appeal from the Circuit Court of County of Kendall
Trial Court Number: 85CM280

THE COURT HAS THIS DAY, 10/05/87, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No. 2-86-0563
Cons. Cases: 2-86-0577

People v. Sequoia Books, Inc.

Petition by defendant-appellant for rehearing denied.

LOREN J. STROTZ, Clerk

EXHIBIT C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

February 3, 1988

Mr. Michael J. Zopf
Reno, O'Byrne & Kepley
P.O. Box 693
Champaign, IL 61820-0693

RECEIVED
Feb. 04, 1988

Reno, O'Byrne & Kepley, P.C.
Champaign, IL 61820

No. 66122 — People State of Illinois, respondent, v. Sequoia Books, Inc., petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 25, 1988.

EXHIBIT D

No. 66122

IN THE
SUPREME COURT OF ILLINOIS

People State of Illinois,

Respondent

No. 66122 v.

Sequoia Books, Inc.,

Petitioner

Appeal from
Appellate Court
AC2-86-0563
AC2-86-0577

(Filed February 24, 1988)

ORDER

This matter has come for consideration upon the motion of petitioner to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

EXHIBIT E

FIRST AMENDMENT
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT F

Illinois Obscenity Statute
Ill.Rev.Stat. (1985) ch. 38, ¶ 11-20

11-20. Obscenity

¶ 11-20. Obscenity. (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participate directly in that portion thereof which make it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulatons of any other jurisdiction; or

(6) Advertise or otherwise promotes the male of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defînal.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes

substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicly indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, education or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

Ill. Rev. Stat. Ch. 38, ¶ 11-20 (1985)

(As revised effective 1/1/86)

11-20. *Obscenity*

¶ 11-20. Obscenity. (a) Elements of the Offense. A person commits obscenity when, with knowledge of the nature or content thereor, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, apply-

ing contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibit of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific values.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is lacking in serious literary, artistics, political or scientific value.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people.

(3) The artistics, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 84-709, § 1, eff. Jan. 1, 1986.

EXHIBIT G

STATE OF ILLINOIS)
) SS.
COUNTY OF KENDALL)

IN THE CIRCUIT COURT FOR THE 16TH JUDICIAL CIRCUIT, KENDALL COUNTY, ILLINOIS

(Filed September 3, 1985)

The People of the State of Illinois to all Peace Officers of the State of Illinois.

85 CM 280

SEARCH WARRANT

On this day, Glenn Calvert, Complainant, has subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint I find that it states facts sufficient to show probable cause and I therefore command that the following person or place:

Denmark Bookstore
1300 Business 30,
Aurora, Kendall County, Illinois, premises described in attached Exhibit "A" incorporated herein

be searched and the following instruments, articles or things which have been used in the commission of, or which constitute evidence of the offense of OBSCENITY

BE SEIZED THEREFROM, NAMELY:

Magazines, containing depictions or portion thereof of the following: Cunnilingus, fellatio, anal intercourse, excretion of semen from penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, insertion of tongue into anus.

I further command that a return and inventory of anything so seized shall be made without necessary delay before me or before any Court of competent jurisdiction.

/s/ John L. Petersen
Judge.

Time and date of issuance Aug. 30, 1985 at 8:30 a.m.

COMPLAINT FOR SEARCH WARRANT

(Filed August 30, 1985)

Glenn Calvert, Complainant, being first duly sworn on oath, now appears before the undersigned Judge of the Circuit Court for the Sixteenth Judicial Circuit, Kendall County, Illinois, and requests the issuance of a Search Warrant to search the person or place as follows: Building known as Denmark Bookstore, 1300 Business 30, Aurora, Kendall County, Illinois, premises described in attached Exhibit "A" incorporated herein and seize the instruments, articles or things which have been used in the commission of, of which constitute evidence of, the offense of OBSCENITY in violation of Chapter 38, Section 11-20, Illinois Revised Statutes, said instruments, articles or things being described as follows:

> Magazines, containing depictions or portion thereof of the following: Cunnilingus, fellatio, anal intercourse, excretion of semen from penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, insertion of tongue into anus.

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the person and/or place set forth above:

See attached affidavit of Glenn Calvert and Ricky M. Holman which is attached and incorporated herein.

Subscribed and sworn to before me,
this 30th day of Aug. 1985.

/s/ Judge John L. Petersen

/s/ G. S. Calvert, Complainant

Glenn Calvert, being first duly sworn, deposes and says as follows:

1. That this affiant is an investigator for the Kendall County State's Attorney Office.

2. That this affiant is familiar with a business being conducted on 1300 Business 30, Aurora, Oswego Township, Illinois, known as Denmark Bookstore and situated on the following described premises: See attached Exhibit "A".

3. That this affiant entered the Denmark Bookstore on August 29, 1985, and purchased three magazines, namely, "Cum Shootout", "Chain Gang Bang" and "Tightropes" which had depictions of the following:

a. Magazine entitled "Cum Shootout" depicted fellatio, anal intercourse, insertion of tongue into anus, excretion of semen onto face and chest and buttocks, male masturbation, analingus, anal intercourse.

b. Magazine entitled "Chain Gang Bang" depicted masturbation, fellatio, anal intercourse, analingus, excretion of semen onto face and buttocks of male.

c. Magazine "Tightropes" depicted masturbation, fellatio, anal intercourse, bondage.

4. That affiant spent approximately 15 minutes in the Denmark Bookstore and observed several hundred magazines, many if not all depicted fellatio, cunnilingus, anal intercourse, analingus, vaginal or oral insertion of prosthetic devices, excretion of semen onto the face and body of another person and masturbation.

5. That all of the magazines above described were offered for sale to the public on August 29, 1985.

/s/ Glenn Calvert

Subscribed and sworn to before
me this 30th day of Aug. 1985.

/s/ John L. Petersen
Judge

Ricky M. Holman, being first duly sworn, deposes and says as follows:

1. That this affiant is an investigator for the Kendall County State's Attorney Office.

2. That this affiant is familiar with a business being conducted at 1300 Business 30, Aurora, Oswego Township, Illinois, known as Denmark Bookstore and situated on the following described premises: See attached Exhibit "A".

3. That numerous criminal charges have been filed in the Circuit Clerk's Office of Kendall County, Illinois, subsequent to August of 1985 under the obscenity statute, namely, Chapter 38, Section 11-20, against various persons resulting from the purchase of magazines and movies from the Denmark Bookstore as above described.

/s/ Ricky M. Holman

Subscribed and sworn to before me
this 30th day of Aug. 1985.

/s/ John L. Petersen,
Judge

IN THE CIRCUIT COURT FOR THE
16TH JUDICIAL CIRCUIT, KENDALL COUNTY,
ILLINOIS

STATE OF ILLINOIS)
) ss.
COUNTY OF KENDALL)

The People of the State of Illinois to all
Peace Officers of the State of Illinois.

SEARCH WARRANT

On this day, Harold Andrews, Complainant, has subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint I find that it states facts sufficient to show probable cause and I therefore command that the following person or place:

Denmark Bookstore
1300 Business 30,
Aurora, Kendall County, Illinois, premises described in attached Exhibit "A" incorporated herein

be searched and the following instruments, articles or things which have been used in the commission of, or which constitute evidence of the offense of OBSENITY BE SEIZED THEREFROM, namely:

Magazines, containing depictions or portion thereof of the following: Cunnilingus, Fellatio, anal intercourse, excretion of semen from penis onto other persons, masturbation, vaginal or anal insertion of pros-

thetic devices, insertion of tongue into anus, and also depiction of male or female persons with genitals or breasts being fettered, bound or otherwise physically restrained, insertions of objects into penis or anus.

I further command that a return and inventory of anything so seized shall be made without necessary delay before me or before any Court of competent jurisdiction.

/s/ James M. Wilson
Judge.

Time and date of issuance 11:45 A.M./February 10, 1986.

COMPLAINT FOR SEARCH WARRANT

(Filed February 10, 1986) 86-CM-27

Harold Andrews, Complainant, being first duly sworn on oath, now appears before the undersigned Judge of the Circuit Court for the Sixteenth Judicial Circuit, Kendall County Illinois, and requests the issuance of a Search Warrant to search the person or place as follows:

Building known as Denmark Bookstore, 1300 Business 30, Aurora, Kendall County, Illinois, premises described in attached Exhibit "A" incorporated herein.

and seize the instruments, articles or things which have been used in the commission of, of which constitute evidence of, the offense of OBSCENITY, in violation of Chapter 38, Section 11-20, *Illinois Revised Statutes*. Said instruments, articles or things being described as follows:

Magazines, containing depictions or portion thereof of the following: Cunnilingus, Fellatio, anal intercourse, excretion of semen from penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, insertion of tongue into anus, and also depiction of male or female persons with genitals or

breasts being fettered, bound or otherwise physically restrained, insertions of objects into penis or anus.

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the person and/or place set forth above:

See attached affidavit of Harold Andrews which is attached and incorporated herein.

Subscribed and sworn to before me,
this 10th day of February, 1986.

/s/ James M. Wilson,
Judge.

/s/ Harold Andrews,
Complainant

Harold Andrews, being first duly sworn, deposes and says as follows:

1. That this affiant is an Illinois State Police Officer.

2. That this affiant is familiar with a business being conducted on 1300 Business 30, Aurora, Oswego Township, Illinois, known as Denmark Bookstore and situated on the following described premises: See attached Exhibit "A".

3. That this affiant entered the Denmark Bookstore on January 2, 1986, and purchased 4 magazines, namely *Hot Tricks, Leather Sleaze, Big Busts Bondage, Instant Porn.*

a. Magazine entitled "*Hot Tricks*" depicted Fellatio, masturbation, insertions of finger into anus, anal intercourse anal insertion of prosthetic devices, excretion of semen onto stomach of another nude male analingus.

b. Magazine entitled *"Leather Sleaze"* depicted masturbation, bondage, fellatio, biting the nipples of another male, licking the armpit of another male, hand being bound by a rope that also runs through the crotch up the back and around the neck of one male subject, excretion of semen onto the face of an individual who is bound and fettered, analingus, insertion of fingers into the anus, of a person whose hands, and genitals are bound and fettered, one male being forced to lick the boot of another male, anal insertion of a baton while genitals were bound, oral insertion of prosthetic device while bound or fettered around the neck by metal chains, anal insertion of prosthetic devices while genitals were bound.

c. Magazine entitled *"Big Busts Bondage"* depicted bare female breasts being tightly bound by rope with a fluid coming from one breast, bare female nipples being bound by rope and pulled taunt while subject is bound and fettered around arms, upper chest and waist, bare female breasts being hit with a stick while female is blindfolded and has hands and arms bound and fettered.

d. Magazine entitled *"Instant Porn"* depicted fellatio, analingus, anal intercourse, excretion of semen onto hands and stomach of others, masturbation.

4. That affiant entered the Denmark Bookstore on February 6, 1986, and purchased 4 magazines, namely *"OBEAH"*, *"Lashes"*, *"Bottoms Up"*, *"Painful Pleasures"*.

a. Magazine entitled *"OBEAH"* depicted anal intercourse, anal insertion of prosthetic device, fellatio, insertion of fingers into vagina, cunnilingus, one person whipping a male person's nude buttocks, a nude female licking her breasts.

b. Magazine *"Lashes"* depicted a nude male's genitals bound with another person's hand pushing metal spike into the genitals, male genitals bound with metal rings, a nude male having a burning cigarette touched to his buttocks while his hands and ankles are bound or fettered, a nude male being struck on the buttocks with a billy club while hands and ankles are bound or fettered, a nude male's scrotum being pinched by surgical clamp while bound or fettered, a burning cigarette being held against a nude male's penis while he was bound or fettered, metal clamp applied to a male's penis, a male's penis being stepped on by a high heel boot while he is bound or fettered to a hanging board.

c. Magazine *"Bottoms Up"* depicting a female being spanked on bare buttock by male with buttocks showing bright red marks, nude male wearing a horse saddle being struck on the buttocks by leather riding crop, nude female being struck on buttocks by paddle while bound or fettered on a wooden x frame, analingus.

d. Magazine *"Painful Pleasures"* depicts male's penis bound in metal rings while he is bound or fettered, male blindfolded with prosthetic device held close to his mouth, male being spanked while bound or fettered, analingus, metal clips applied to male's nipples, nude male with penis bound in rope while bound and suspended from a pulley, male's penis and scrotum being struck with a paddle while male is bound and fettered, male penis with clothes pins attached, prosthetic device being put in male's mouth while the male is bound or fettered, nude male with metal clamp with weights attached clamped to scrotum, burning candle held next to male's hands while bound or fettered.

5. That affiant spent in excess of 30 minutes on January 2, 1986, and February 6, 1986, in the Denmark Book-

store and observed several hundred magazines and videos, many if not all depicted fellatio, cunnilingus, anal intercourse, analingus, vaginal, oral or anal insertion of prosthetic devices, excretion of semen onto the face and body of another person and masturbation as well as depictions of male or female persons with genitals or breasts being fettered, bound or otherwise physically restrained.

6. That all magazines above described were offered for sale to the public on January 2, 1986, and on January 6, 1986.

Further affiant sayeth not.

/s/ Harold Andrews

Subscribed and sworn to before me
this 10th day of February, 1986.

/s/ James M. Wilson,
Judge.

EXHIBIT H

WALTER S. KOZUBOWSKI, CITY CLERK
CITY CLERK'S OFFICE—CITY OF CHICAGO
CHAPTER 194C*

§§ 194C-1 to 194C-7.2

ADULT USE ORDINANCE

SECTION 1. Pursuant to the provisions of the Constitution of the State of Illinois of 1970, the Municipal Code of the City of Chicago is hereby amended by add-

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*New chapter passed Coun. J. 7-7-77, p. 5492.

ing a new chapter thereto to be numbered 194C and known as the Chicago Adult Use Ordinance, as follows:

SECTION 2. Intent and Purpose.

To regulate uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area.

SECTION 3. Definitions.

A. Adult Book Stores. An establishment having as a substantial or significant portion of its stock in trade, books, magazines, films for sale or viewing on premises by use of Motion Picture devices or any other coin-operated means, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities," or "Specified Anatomical Areas," or an establishment with a segment or section devoted to the sale or display of such material.

B. Adult Motion Picture Theater. An enclosed building with a capacity of 50 or more persons used regularly and routinely for presenting material having as a dominant theme material distinguished or characterized by an emphasis on matter depicting, describing or relating to

"Specified Sexual Activities" or "Specified Anatomical Areas," for observation by patrons therein.

C. Adult Mini Motion Picture Theater. An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis or matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas," for observation by patrons herein.

D. Adult Entertainment Cabaret. A Public or Private Establishment which is licensed to serve food and/or alcoholic beverages, which features topless dancers, strippers, male or female impersonators, or similar entertainers.

E. "Specified Sexual Activities" is defined as:

1. Human genitals in a state of sexual stimulation or arousal;
2. Acts of human masturbation, sexual intercourse or sodomy;
3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

F. "Specified Anatomical Areas" is defined as:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock and (c) female breast below a point immediately above the top of the areola; and
2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

SECTION 4. Regulated Uses.

Regulated Uses include all Adult Uses which include, but are not limited to the following:

Adult Book Store.

Adult Motion Picture Theater.

Adult Mini Motion Theater.

Adult Entertainment Cabaret.

4.1. Adult Uses shall be permitted subject to the following restrictions:

(1) No such Adult Uses shall be allowed within 1000 feet of another existing adult use.

(2) No such Adult Use shall be located within 1000 feet of any Zoning District which is Zoned for Residential Use.

(3) No such Adult Use shall be located within 1000 feet of a pre-existing School or place of worship.

(4) No such Adult Use shall be located in any Zoning District except a C-2 zoned area.

SECTION 5. Registration.

Registration: The Owner of a building or premises, his agent for the purpose of managing, controlling, or collecting rents, or any other person managing or controlling a building or premises, any part of which contains an Adult Use shall register with the Department of Revenue of the City of Chicago the following information:

(a) The address of the premises.

(b) The name of the owner of the premises and names of the beneficial owners if the property is in a land trust.

(c) The address of the owner and the beneficial owners.

(d) The name of the business or the establishment subject to the provisions of Section 4.

(e) The name(s) of the owner, beneficial owner or the major stock holders of the business or the establishment subject to the provisions of Section 4.

(f) The address of those persons named in paragraph (e).

(g) The date of initiation of the Adult Use.

(h) The nature of the Adult Use.

(i) If the premises or building is leased, a copy of the said lease must be attached.

5.1. It is unlawful for the owner or person in control of any property to establish or operate thereon or to permit any person to establish or operate an adult use without first having properly registered and received certification of approved registration.

5.2. The owner, manager or agent of a registered Adult Use shall display a copy of the Registration Form approved by the Department of Revenue in a conspicuous place on the premises.

SECTION 6. Exterior Display.

6.1. No Adult Use shall be conducted in any manner that permits the observation of any material depicting, describing or relating to "Specified Sexual Activities"

or "Specified Anatomical Areas," from any public way or from any property not registered as an Adult Use. This provision shall apply to any display, decoration sign, show window or other opening.

6.2. If any provision of this chapter or the application of any provision to any item in this chapter, is held invalid, the invalidity of that provision or application shall not affect any of the other provisions of the application of those provisions to other items in this chapter.

6.3. Any person violating any of the provisions of this chapter shall be fined not less than $50.00 (fifty-dollars) nor more than $200.00 (two-hundred dollars) for each offense and each day such violation shall continue shall be regarded as a separate offense.

SECTION 7. Consumer Protection.

7.1. All adult entertainment cabarets shall display at the bar and at each table, counter or other area or place where any food, beverages, goods, wares, merchandise or service is sold, served or provided, a complete list of all prices, fees and charges for all food, beverages, goods, wares and merchandise sold or services rendered. These lists shall be written in clearly visible letters and figures of a size not less than 14 point type. (Passed. Coun. J. 2-15-78, p. 7298.)

7.2. Any person violating any of the provisions of Section 7.1 shall be fined not less than fifty dollars nor more than five hundred dollars for each offense. Each violation of Section 7.1 may be grounds for revocation of any license issued to any such establishment by the City of Chicago. (Passed. Coun. J. 2-15-78, p. 7298.)

43 1-1-79 (Amended)

STATE OF ILLINOIS,)
) SS.
COUNTY OF COOK.)

I, ALTER S. KOZUBOWSKI, City Clerk of the City of Chicago in the County of Cook and State of Illinois, DO HEREBY CERTIFY that the annexed and foregoing is a true and correct copy of Chapter 194C of the Chicago Municipal Code entitled "Adult Use Ordinance".

I DO FURTHER CERTIFY that the original, of which the foregoing is a true and correct copy, is on file in my office and that I am the lawful custodian of the same.

WITNESS MY HAND and the corporate seal of the said City of Chicago this twenty-sixth (26th) day of March, A.D. 1985.

/s/ Walter S. Kozubowski, City Clerk

No. 87-1646

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SEQUOIA BOOKS, INC.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROBERT J. RUIZ
Solicitor General, State of Illinois
TERENCE M. MADSEN
JACK DONATELLI *
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2569

Counsel for Respondent

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 34132—50—6-23-88)

QUESTIONS PRESENTED

1. Did the search warrant procedure comply with constitutional authority? Is there any conflict between the Illinois Appellate Court opinion and decisions from the Courts of Appeals?

2. Did the procedure which provided special interrogatories to assure that single general verdict was based upon specific consideration of all the magazines comply with constitutional authority? Did this procedure affect the independent function of the jury? Did it actually benefit petitioner?

3. Did the denial of evidence tendered by the defense and refused as irrelevant comply with constitutional law? Is there any conflict between the Illinois Appellate Court opinion and decisions from other courts?

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No. 87-1646

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On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

Respondent asks this Court to deny the petition for writ of certiorari to review the judgment and order of the Appellate Court of Illinois, Second District, insofar as the petitioner does not raise any issues worthy of review by the Court.

OPINION BELOW

The opinion below is cited as *People v. Sequoia Books*, 160 Ill.App.3d 315, 513 N.E.2d 468 (1987). A copy of the opinion is included in petitioner's appendix.

STATEMENT OF THE CASE

Petitioner Sequoia Books, Inc., was charged by complaint with obscenity in two separate cases in Kendall County, Illinois. Sequoia Books was found guilty by separate juries in each case and sentenced to a $1,000 fine, plus costs, in one case and a $924 fine, plus costs, in the other.

A) The Search Warrants

Charges in these cases arose after a Kendall County judge issued a search warrant on August 9, 1985, for the Denmark Bookstore in Aurora, Illinois, which is owned and operated by Sequoia Books. The warrant authorized a search for evidence of the offense of obscenity and seizure of magazines that contained depictions of certain sexual conduct.

The warrant was supported by the affidavits of two investigators with the State's Attorney's office. One investigator stated that he had observed hundreds of magazines depicting acts described in the warrant. The other stated that numerous charges had been filed against the various persons resulting from the purchase of magazines and

movies from the Denmark Bookstore. Officials went to the Denmark Bookstore and, pursuant to the warrant, seized 48 different magazines.

Another search warrant was issued February 19, 1986. This one also authorized the seizure of magazines containing depictions of sexual activity and bondage. It was supported by the affidavit of an investigator with the State's Attorney's office who stated that he had recently purchased eight magazines from the store. These magazines were tendered to the judge for review upon issuance of the warrant. Pursuant to this warrant, officials went to the bookstore and seized 177 magazines.

B) The Charges and Pretrial Motions

Sequoia Books was charged in two separate cases with one count of obscenity. Each complaint charged that Sequoia Books had offered obscene magazines for sale and incorporated by reference the list of magazines that had been seized. Sequoia Books pleaded not guilty in each case.

In each case, Sequoia Books filed motions to quash the search warrant, to suppress the evidence, and to return the items seized on the basis that the search and seizures violated its First, Fourth, and Fourteenth Amendment rights. Following an evidentiary hearing, motions in both cases were denied.

Sequoia Books also filed motions to dismiss in each case on several bases. One was that the complaints were improperly drawn insofar as a large number of magazines had been included within a single count. The other was that the Illinois obscenity statute was unconstitutional in both its pre-1986 form and its post-1986 form. After a hearing in both cases, the motions to dismiss were denied.

Trials

The same judge presided over both trials. In both trials, the State's case consisted of 1) a stipulation by the parties that Sequoia Books owned and operated the bookstores, that it offered the charged magazines for sale on the dates in question, and that it knew the nature and contents of the magazines; 2) testimony that the magazines lacked value, had a negative and dehumanizing effect on the average adult, and that each of the magazines appealed to the prurient interest of the average adult; and 3) the magazines themselves. Additionally, in the second case, the State presented testimony that the magazines had no serious value in the fields of literature or art.

The defense in both trials was that the magazines were not obscene under contemporary community standards. Its case consisted of 1) a public opinion poll conducted in 1983 that was designed to establish the attitudes that adults living across the State of Illinois have towards sexually explicit material; 2) testimony as to the various bookstores in communities throughout Illinois and the types of magazines they offered for sale; 3) testimony that the magazines did not appeal to prurient interest but, rather, appealed to the normal curiosity of the average adult about sex; and 4) testimony that the magazines would not lead the average adult to commit antisocial acts and that the magazines had value in that they provided a release and entertainment for a segment of the population.

In both cases, the court refused to allow the defense to introduce certified copies of adult-use ordinances from several municipalities throughout Illinois which it had offered as evidence of community standards.

At the jury instruction conferences, there was a debate over whether the jury had to find all the magazines obscene or just one. The State offered instructions which

permitted the jury to find Sequoia Books guilty if it found a single magazine to be obscene. Sequoia Books tendered alternative instructions which would require the jury to find all of the magazines obscene in order to find it guilty.

In both cases, the court accepted the State's theory that the State could proceed on a single count for as many magazines as it chose and obtain a conviction regardless of a finding by the jury that some of the magazines were not obscene and thus constitutionally protected. In both cases, general verdicts were given to the jury, as well as a special interrogatory, over defense objections, requiring it to answer "yes" or "no" as to the obscenity of each magazine on trial. Also over defense objection, the court gave the State's instruction which allowed the jury to rely on their "collective observations" in applying Illinois contemporary standards. The court refused the instruction, tendered by the defense, which would have informed the jury that the issue of obscenity should be decided in the context of dissemination of the magazine.

The jury returned a general verdict of guilty in each case. In the first case, the special interrogatories found 8 magazines obscene but left 40 blanks. After the court accepted the general verdict and instructed the jury to continue deliberation, the jury returned with a finding that all 40 magazines were not obscene. In the second case, the special interrogatories were fully completed, finding 170 magazines obscene and 7 not obscene.

Direct Appeal

Sequoia Books raised eight issues, many of which were rejected on the basis of opinions the court had rendered in previous actions involving the same defendant: *People v. Sequoia Books*, 145 Ill.App.3d 1054 (1986) and *People v. Sequoia Books*, 146 Ill.App.3d 1 (1986).

The first three issues, also raised now, attacked the search warrant: that the warrant applications failed to demonstrate probable cause, that the search was overly broad, and that the warrant process was a plan to economically harm the operation of the bookstore. The appellate court had rejected similar contentions involving similar warrants in earlier cases and declined to reconsider its previous decisions.

The fourth attack on the constitutionality of the obscenity act, which is not raised before this Court, was rejected. The court declined to find the pre-1986 act unconstitutional, relying on this Court's opinion in *Pope v. Illinois*, 481 U.S. ____, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987). It also rejected that the term "prurient interest" in the post-1986 act was insufficiently defined. This issue is not raised in the petition to this Court.

The court rejected the fifth claim, which is also presented to this Court, that evidence of the adult-use ordinances was improperly refused, on the basis of a previous Sequoia Books opinion and where it was not relevant since such ordinances also regulate non-obscene materials.

The next two issues involved jury instructions and are not presented now. The court rejected the attack on a certain jury instruction on the basis of a previous Sequoia Books opinion and on this Court's opinion in *Pope v. Illinois* and also because, on the record, any possible error could only be harmless. It rejected the claim that the court improperly refused the defense's non-IPI instruction on the basis of prior opinions.

Last, the court found no error in the procedure whereby the jury received a general verdict form along with special interrogatories as to the obscenity of each magazine. This issue is re-raised in the petition to this Court.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO REASON WHY THIS COURT SHOULD REVIEW THE SEARCH WARRANT PROCEDURE SINCE IT COMPLIED WITH CONSTITUTIONAL AUTHORITY; PETITIONER HAS FAILED TO SHOW THAT CONSTITUTIONAL ERROR OCCURRED OR THAT THE STATE'S DECISION CONFLICTS WITH DECISIONS FROM THE COURTS OF APPEALS.

Sequoia Books alleges two reasons why this Court should review the search warrant procedure in this case: 1) this Court must correct constitutional error that occurred within that procedure and 2) it must resolve a conflict in the law regarding search warrants in first amendment cases. However, neither is a reason for granting review.

First, constitutional error did not occur in this case. The search warrant procedure was consistent with the special first amendment requirements outlined by this Court in *New York v. P.J. Video*, 475 U.S. 868 (1986). *P.J. Video* requires that, before authorizing the seizure of materials presumptively protected by the first amendment, the magistrate must make sure that the warrant application is supported by affidavits setting forth specific facts. This requirement enables the judge to focus searchingly on the question of obscenity. Furthermore, the police may not dispense with the warrant requirement, as they ordinarily could in exigent situations, whenever this would constitute a prior restraint. Rather, large-scale seizures must be preceded by an adversarial hearing on the obscenity question before the search can take place. But it is a defendant's burden to make the pretrial showing of a "substan-

tial" prior restraint before such an adversarial hearing need take place.

But aside from these, warrant applications for seizures of allegedly obscene magazines are the same as those applied generally. The magistrate must apply a uniform standard of probable cause: a probability or substantial chance of criminal activity, not an actual showing.

The principles of *P.J. Video* were followed by the issuing magistrate in the cases at bar. Despite petitioner's contrary claim, the judge who issued the August, 1985, warrant after an adversarial hearing did searchingly focus on the obscenity of the magazines to be seized by making sure that the warrant application was supported by affidavits setting forth specific facts. The warrant application was supported by two affidavits, each from an investigator with the State's Attorney's office. One investigator stated that he had been to the bookstore and purchased three magazines entitled Cum Shootout, Chain Gang Bang, and Tightropes, each of which depicted more than one sexual act listed on the application. The application listed the following acts: cunnilingus, fellatio, anal intercourse, excretion of semen from a penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, and insertion of a tongue into an anus. The investigator also observed over a hundred magazines, many of which, if not all, depicted the same acts. All of these magazines were offered for sale to the public. The second affidavit stated that numerous charges had been filed against the various persons resulting from the purchase of magazines and movies from the Denmark Bookstore.

These affidavits gave the judge the opportunity to determine that there was a probability of criminal activity occurring in the bookstore, namely the sale of magazines

not protected by the first amendment. The judge therefore issued a warrant authorizing officials to seize such magazines. The issuing judge was not constitutionally required to first examine the materials which were to be seized. The affidavits were sufficient since, in *P.J. Video*, the warrant issued on the basis of affidavits detailing the character of certain films and the issuing magistrate did not view the films himself. *See also Sequoia Books v. McDonald*, 725 F.2d 1091 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 83 (magistrate properly issued warrant based on affidavits and without himself viewing magazines).

Since the warrant contained the same language as the warrant application in defining the nature of the sexual depictions, petitioner's contention that the warrant was a general one which left total discretion to the executing officers as to what items and what quantity was to be seized is refuted. The officers were limited in their seizure to magazines containing the depictions listed on the warrant.

Nor did the issuance of the warrant constitute a prior restraint. A prior restraint occurs only when the police rely on exigent circumstances to dispense with the warrant requirement and make a large-scale seizure. There is no prior restraint, even where there is a large-scale seizure, so long as the police first obtain a warrant after an adversarial hearing on the obscenity question. Moreover, it is defendant's own burden to prove the prior restraint before the holding of the adversarial hearing. Thus there was no prior restraint in this case since the State secured a warrant after an adversarial proceeding and since Sequoia Books never proved the existence of a substantial prior restraint before the seizure took place.

Furthermore, because of this failure, there is no evidence that Sequoia Books was in any way economically

harmed, that the police seized any more than a single copy of each magazine, or that the store was closed down. Rather, it appears from the record that some magazines were seized for evidentiary purposes and the store continued to operate throughout the entire prosecution.

The same is true for the February, 1986 warrant. The warrant application was supported by an affidavit from an investigator with the State's Attorney's office. It stated that he had been to the bookstore on two separate recent evenings and purchased eight magazines. All eight magazines were tendered to the judge for his perusal. The affidavits and magazines enabled the judge to determine that criminal activity was probably occurring in the bookstore. The judge therefore issued a warrant authorizing the seizure of such magazines.

This warrant contained language identical to that in the August, 1985 warrant insofar as it defined the sexual depictions that must be contained in a magazine before it is seized. It additionally included depictions of male or female persons with genitals or breasts being fettered or bound or otherwise physically restrained and the insertion of objects into a penis or anus. Thus again, the executing officers did not have total discretion as to what items and what quantity they could seize. They were limited in their seizure to magazines containing the depictions listed on the warrant. Finally, this second warrant did not constitute a prior restraint for the same reasons as the first warrant.

Similar warrant procedure was upheld in *People v. Sequoia Books*, 145 Ill.App.3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986), *People v. Sequoia Books*, 146 Ill.App.3d 1, 496 N.E.2d 740 (2nd Dist. 1986), and *People v. Sequoia Books*, 150 Ill.App.3d 211, 501 N.E.2d 856 (2nd Dist. 1986). There-

fore, Sequoia Books has failed to show the existence of a constitutional error that needs correction by this Court.

Sequoia Books also claims that the Illinois Appellate Court refusal to condemn these warrants as general warrants cannot be squared with two cases from the Courts of Appeals, *United States v. Guarino*, 729 F.2d 864 (1st Cir. 1984) and *United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977). But, in fact, there is no conflict between these cases and the Illinois appellate court opinion. These opinions agree that 1) a search warrant must define what is to be seized with specificity so that the executing officer may not exercise judgment when making seizures and that 2) probable cause for a warrant requires that the materials first be viewed.

In *Guarino*, specificity was lacking because the warrant authorized nothing more specific than the seizure of "obscene materials," leaving it to the officer's opinion to decide what is obscene. *Guarino*, 729 F.2d at 865, 867. But specificity was not lacking in this case. The August, 1985 warrant authorized the officers to seize only those magazines depicting factually identifiable acts such as cunnilingus, fellatio, anal intercourse, excretion of semen from a penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, and insertion of a tongue into an anus. The February, 1986 warrant contained that identical list, as well as depictions of male or female persons with genitals or breasts being fettered or bound or otherwise physically restrained and the insertion of objects into a penis or anus. The warrants at bar contained the specificity found lacking in *Guarino*.

In *Tupler*, probable cause was lacking because the State did not view the alleged obscene films nor tender them to the issuing judge for review, but assumed they were

obscene from film packaging. *Tupler*, 564 F.2d at 1297. But probable cause was not lacking in this case. With regard to the August, 1985 warrant, an investigator for the State personally viewed over one hundred magazines in the bookstore and saw that each depicted such acts as cunnilingus, fellatio, anal intercourse, excretion of semen from a penis onto other persons, masturbation, vaginal or anal insertion of prosthetic devices, and insertion of a tongue into an anus. All were offered for sale and he purchased three magazines entitled Cum Shootout, Chain Gang Bang, and Tightropes. As to the February, 1986 warrant, a State investigator personally viewed the magazines at the bookstore containing the same depictions listed above and then purchased eight magazines that he tendered to the judge. The warrants at bar were based on the probable cause that was lacking in *Tupler*.

Therefore, there is no conflict between the Illinois opinion and *Guarino* and *Tupler*.

II.

THE PROCEDURE ALLOWING A SINGLE CONVICTION AND GENERAL VERDICT BASED ON NUMEROUS MAGAZINES ASSURED SPECIFIC CONSIDERATION OF ALL THE MAGAZINES BY USE OF SPECIAL INTERROGATORIES; THE SPECIAL INTERROGATORIES DID NOT IMPAIR THE JURY'S INDEPENDENT FUNCTION AND ACTUALLY BENEFITED PETITIONER.

Sequoia Books asks this Court to review the procedure of seeking a single conviction based on numerous magazines because it resulted in constitutional error. He claims that the single count method constituted a prior restraint by denying the jury the opportunity to specifically consider each magazine and creating the probability that no 12 jurors unanimously agreed upon the obscenity of any

one magazine. The use of special interrogatories to assure specific consideration did not prevent the error but actually expanded the strict elements of the offense and potentially infringed on the jury's freedom.

However, constitutional error did not occur here. In the first trial, the State sought a single conviction for obscenity based on any of 48 individual magazines. In the second trial, it sought a single conviction for obscenity based on any of 177 individual magazines. To assure, in each case, that all twelve jurors gave specific consideration all the material, the jurors were required to answer special interrogatories as to the obscenity of each magazine.

This Court noted in *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 1362 (1969), that in some circumstances a general verdict can present a problem. Thus, in *Street*, the validity of a general verdict for flag desecration was questionable where there was no way to know from the record whether it was based on the permissible ground of burning the flag or the impermissible ground of speaking contemptuously about the flag or an impermissible combination of both. But that problem was eliminated at bar by the giving of special interrogatories. These demonstrated that, in the first case, the jury determined that 8 of 48 magazines were obscene and supported its single verdict. In the second case, 170 of 177 magazines were obscene and supported its verdict. This procedure assured that whole jury specifically considered each magazine and reached unanimous agreement before finding any magazine to be obscene.

The procedure created several additional advantages here, as well. It reduced the vast number of instruction and verdict forms that would have otherwise been necessary, it assured that the non-obscene books were returned

to the petitioner, and it lessened the collective impact of the material. Moreover, it exposed petitioner to only two obscenity convictions, rather than a possible 225 convictions.

While it is true that special interrogatories are not generally given in criminal trials, the Constitution does not forbid them. *See Heald v. Mullaney*, 505 F.2d 1241 (1st Cir. 1974). They are suspect only insofar as they may jeopardize the independence of the jury by coloring its decision-making process with a step-by-step series of questions inexorably leading the jury to conclude that defendant is guilty. *Heald*, 505 F.2d at 1246; *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969). Where they do not impair the jury's independent function and actually benefit a defendant, their use will survive a constitutional challenge. *Heald*, 505 F.2d at 1246.

Here, the special interrogatories imposed no special burden on the jury. The jury was duty bound to examine each magazine and the special interrogatories assured that it did. Had the jury been instructed in the manner requested by petitioner, its function would have been identical: to examine each magazine and determine whether it was obscene or not. Moreover, as already explained, Sequoia Books actually benefited in several material ways from this procedure. The procedure here survives constitutional challenge. No constitutional error occurred.

III.

THERE IS NO REASON WHY THIS COURT SHOULD REVIEW THE INADMISSIBILITY OF EVIDENCE TENDERED BY THE DEFENSE SINCE IT WAS PROPERLY DEEMED IRRELEVANT; PETITIONER HAS FAILED TO SHOW THAT CONSTITUTIONAL ERROR OCCURRED OR THAT THE STATE'S DECISION CONFLICTS WITH OTHER JUDICIAL DECISIONS.

Sequoia Books asks this Court to review a question of admissibility of evidence for two reasons: 1) it must correct constitutional error that occurred when the trial court would not allow the defense to present adult-use ordinances as evidence of contemporary community standards, and 2) it must resolve a conflict among several courts as to whether this evidence is admissible. However, neither is a reason for granting review.

First, constitutional error did not occur in this case. A jury does not need extrinsic evidence to determine community standards. The whole point of the standard of the contemporary community is that a juror has his own understanding of the community in which he lives and his own knowledge of the propensities of the average person in his community, so that his determination is not dependent on expert advice or extrinsic evidence. *Hamling v. United States*, 418 U.S. 87, 104-105 (1974); *Smith v. United States*, 431 U.S. 291, 302 (1977).

Still, the Constitution does not forbid evidence relevant to the community standard. *Smith*, 431 U.S. at 302. Trial courts have wide discretion to admit or exclude evidence based on their assessment whether it may possibly assist the jury in its resolution. *Hamling*, 418 U.S. at 108. Thus, in *Smith*, no error occurred when the federal jury sitting in Iowa heard evidence that the State of Iowa did not regulate the distribution of obscene materials to adults.

The evidence was relevant because a state statute clearly reflects the mores of the community since the community's legislative body enacted the statute.

But municipal adult-use zoning ordinances are not relevant evidence of community mores as to obscene materials. These ordinances are adopted to geographically regulate activity within a municipality, including both obscene and non-obscene forms of sexually-related activity. Municipalities in Illinois do not adopt them as an acknowledgment that their citizens accept materials deemed obscene. Therefore, the Illinois courts have consistently ruled that adult-use ordinances are simply not relevant to the question of how an average person in the community would assess the question of obscenity. *People v. Sequoia Books*, 146 Ill.App.3d 1, 496 N.E.2d 740 (2nd Dist. 1986); *People v. Sequoia Books*, 150 Ill.App.3d 211, 501 N.E.2d 856 (2nd Dist. 1986); *People v. Sequoia Books*, 160 Ill.App.3d 750, 513 N.E.2d 1154 (2nd Dist. 1987).

This is not a case where Sequoia Books was prevented from presenting evidence of a community standard. Petitioner was allowed to present: 1) a public opinion poll to establish the attitudes that adults living across the State of Illinois have towards sexually explicit material; 2) testimony as to the various bookstores in communities throughout Illinois and the types of magazines they offered for sale; 3) expert testimony that the magazines did not appeal to prurient interest but, rather, appealed to the normal curiosity of the average adult about sex; and 4) expert testimony that the magazines would not lead the average adult to commit antisocial acts and that the magazines had value in that they provided a release and entertainment for a segment of the population. But certainly no constitutional error occurred by the denial of

admission of adult-use ordinances where Sequoia Books failed to establish their relevancy.

Nor is there a conflict on this issue. Sequoia Books incorrectly claims that such evidence would be admissible if presented by the defense in the Seventh Circuit and in the State of Ohio, citing *United States v. Various Articles of Merchandise*, 750 F.2d 596, 599 (7th Cir. 1984) and *State ex rel. Leis v. William S. Barton Company, Inc.*, 45 Ohio App.2d 249, 344 N.E.2d 342 (1975). These cases do not so hold.

In *Various Articles*, the Seventh Circuit reaffirmed that extrinsic evidence of a community standard is not required. But if extrinsic evidence is offered, then in order to be admitted, it "must address material clearly akin to the material in dispute." *Various Articles*, 750 F.2d at 599. Thus, the adult-use ordinances would clearly *not* be admissible in the Seventh Circuit, since they address material and concerns beyond that sold by petitioner in this case.

In *Leis*, the Ohio court found that it was error to deny a defendant's right to introduce evidence which directly related to the issue of obscenity. But adult-use ordinances relate to the issue of geographic regulation of sexually-related activity regardless of whether it is obscene. Since they do not directly relate to the issue of obscenity, they would clearly *not* be admissible in Ohio.

Therefore, there is no conflict between the Illinois opinion and *Various Articles* and *Leis*.

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to deny the petition for writ of certiorari.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROBERT J. RUIZ
Solicitor General, State of Illinois

TERENCE M. MADSEN
JACK DONATELLI *
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2569

Counsel for Respondent

* Counsel of Record